In the Supreme Court
Appeal from the Michigan Court of Appeals
Murphy, C.J., and Markey and Riordan, JJ.

BANK OF AMERICA, N.A.,

Plaintiff-Appellant,

v

FIRST AMERICAN TITLE INSURANCE CO., PATRIOT TITLE AGENCY, LLC, KIRK D. SCHIEB, WESTMINSTER ABSTRACT CO. d/b/a WESTMINSTER TITLE AGENCY, INC., THE PRIME FINANCIAL GROUP, INC., VALENTINO M. TRABUCCHI, PAMELA S. NOTTURNO f/k/a PAMELA S. SIIRA, DOUGLAS K. SMITH; JOSHUA J. GRIGGS, NATHAN B. HOGAN, STATE VALUE APPRAISALS LLC, and CHRISTINE D. MAYS,

Defendants-Appellees,

and

FRED MATSON, MICHAEL LYNETT, JO KAY JAMES, and PAUL SMITH,

Third-Party Defendants.

Docket No. 149599

Court of Appeals No. 307756

Oakland County Circuit Court
LC No. 2010-112606-CK

BRIEF ON APPEAL - DEFENDANT-APPELLEE FIRST AMERICAN TITLE INSURANCE COMPANY

ORAL ARGUMENT REQUESTED

Steven M. Ribiat (P45161)
Attorney for Defendant-Appellee
First American Title Insurance Company
410 S. Old Woodward, Suite 400
Birmingham, MI 48009
(248) 971-1800
ribiat@bwst-law.com

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STATEMENT OF JURISDICTION OF THE SUPREME COURT

First American Title Insurance Company does not dispute Bank of America's jurisdictional statement.

STATEMENT OF QUESTIONS PRESENTED

I. Whether the full credit bid rule, as stated and applied in *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63; 761 NW2d 832 (2008), is a correct rule of law and properly applied in this case.

Plaintiff-Appellant answers: No.
Defendants-Appellees First American and Westminster answer: Yes.
The Oakland County Circuit Court did not answer this question.
The Court of Appeals answered: Yes.
This Court should answer: Yes.

INTRODUCTION

Like many financial institutions, Bank of America made a number of poor loans during the period leading up to the 2008 financial crises. Rather than take any responsibility for the inadequate underwriting and lending practices underlying its financing of the loans at issue in this case, including its complete failure to evaluate potential borrowers and confirm whether they were providing falsified financial and employment information to obtain their loans, Bank of America instead sought to shift financial responsibility for these bad loans entirely to First American Title Insurance Company ("First American").

Bank of America's claims against First American, however, ignore well-established controlling law and further ignore the fact that after Bank of America foreclosed upon each of the defaulted loans, it subsequently obtained marketable title to the properties by successfully bidding on them at a sheriff's foreclosure sale. For two of the properties, Bank of America chose to bid the amount it was owed by its borrowers (i.e., a "full credit bid"), and thus successfully obtained title to those properties in exchange for the satisfaction of the borrower's mortgage debt. As to these two properties, the Court of Appeals correctly and unremarkably held that Bank of America could not thereafter seek damages from First American, because Bank of America obtained title to property that *Bank of America* valued equal to the amount it was owed on the loans and, therefore, it did not incur damages that could be recoverable from First American (or anyone else).

Bank of America now challenges the Court of Appeals' application of the well-established "full credit bid" rule in this case and in *New Freedom Mortgage Corp v Globe*

Mortgage Corp, 281 Mich App 63; 761 NW2d 832 (2008).[1] Relying upon hyperbole, Bank of America suggests that the Court of Appeals' rulings here and in *New Freedom* supposedly cause a material injustice to lenders and creates uncertainty in the foreclosure process. But there is no injustice or uncertainty when a lender is held to the bid it elects to make to acquire foreclosed property. Indeed, whether to bid on the property, and the amount of that bid, are decisions that rest squarely and exclusively with the lender. In fact, it would be unjust for a lender to bid the full loan amount to acquire foreclosed property—discouraging other potential third-party bidders in the process—and after successfully obtaining title to the property, thereafter assert that the property was worth less than its bid so it can pursue claims against others. This is precisely what Bank of America tried to do here, and what the full credit bid rule and well-settled estoppel principles do not permit. Accordingly, First American respectfully requests that the Court decline Bank of America's invitation to alter the long-standing full credit bid rule, as applied by the Court of Appeals in this case and in *New Freedom*, and instead affirm the Court of Appeals' decision.

COUNTER-STATEMENT OF FACTS AND PROCEDURAL HISTORY

I. Background.

This is an alleged mortgage fraud lawsuit arising out of four residential loans approved and financed by Bank of America in December 2005 and January 2006. There is no dispute that the loans were "stated income loans"—meaning that Bank of America made the loans (totaling more than $7 million) based only on the borrowers' credit scores and without conducting any diligence or verification of the income stated on the borrowers' loan application. (See Miller

[1] Bank of America's appeal also challenges the Court of Appeal's rulings with respect to the dismissal of Bank of America's claims against Westminster Title Agency, Inc. ("Westminster"). The Court of Appeals' reasoned decision in that regard was entirely correct, but because those issues pertain to, and will be addressed by, Westminster, First American confines its discussion here to Bank of America's attack on the Court of Appeals' application of the full credit bid rule.

Dep. p. 21 at 1313JA; Gleiser Dep. p. 30 at 0170JA.)[2] The borrowers were introduced to Bank of America by one of its outside, independent mortgage brokers (now-defunct Prime Financial), and the loans were closed by independent title policy issuing agents authorized to issue First American title insurance policies. (Complaint, ¶¶ 26-27, at 041JA.)

Two of the loans (Enid property and Heron Ridge property) were closed by defendant Westminster Title Agency ("Westminster"). (Complaint, ¶¶ 64, 68; 91, 93, at 041JA.) The remaining loans (Kirkway property and Golf Ridge property) were closed by now-defunct Patriot Title Agency. (Complaint, ¶¶ 52, 56; 79, 83, at 041JA.)

Bank of America claims that it was duped into making the four stated income loans based upon (a) loan applications with false income and asset information prepared and submitted by the mortgage broker, Prime Financial, on behalf of the borrowers, and (b) inflated real estate appraisals for the subject properties prepared by various non-party appraisers. (Complaint, ¶¶ 38, 41-43, at 041JA.) Neither First American nor its independent title policy issuing agents were involved in those activities. Bank of America further claims that it agreed to close and finance the loans based upon HUD-1 settlement (or closing) statements prepared by Westminster and Patriot Title, and that the HUD-1s did not comply with Bank of America's closing instructions for closing the subject loans.[3] (Complaint, ¶ 45, at 041JA.)

Westminster is, and Patriot Title was, one of First American's many independent, non-exclusive agents authorized to issue title insurance commitments and policies insured by First

[2] To avoid burdening this Court and the record with duplicative exhibits, the parties agreed to the submission of a Joint Appendix ("JA") and citations to relevant exhibits will identify the JA page number(s).

[3] A HUD-1 is a federally mandated statement detailing the receipt and disbursement of funds in the closing of a residential real estate transaction.

American pursuant to a written agency agreement ("Policy Issuing Agent").[4] First American's agency agreement provides that the Policy Issuing Agent is an agent of First American only for the purpose of "issu[ing] title insurance policies and commitments" and not for any other purposes.[5]

First American's agency agreement does not authorize Westminster or Patriot Title to close real estate transactions as an agent for First American. See e.g., *Bergin Financial, Inc v First American Title Company*, 397 Fed Appx 119, 124, 2010 WL 3272756 (CA 6, 2010) (applying the same language as in the Policy Issuing Agency Contract here, court holds that policy issuing agent "did not have actual authority—express or implied—to act as First American's agent when closing real estate transactions.") (A copy of this decision is at 1218JA). See also Richard J Landau & Kristin M Tsangaris, *The Mortgage Fraud Epidemic*, S&P's The Review of Banking and Financial Services, Vol 22 No 4, p 36, April 1, 2006 (See 1226JA):

> Under the agency agreement between the title insurer and its agent, the agent is generally only authorized to issue title commitments and policies, and is prohibited from conducting closing and escrow services within the scope of the agency. Since these services are performed outside the agent's express and implied actual authority, the principal is not liable for the agent's actions.

When independent Policy Issuing Agents like Westminster and Patriot Title act as closing agents for real estate transactions, they are not acting within the scope of their authority for the title insurer. Indeed, a person or entity may be an agent of a principal for one purpose, but not the agent of the principal for another related purpose. *Glidden Co v Jandernoa*, 5 F Supp 2d

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[4] See 1183JA, National Agency Agreement by and Between First American and Westminster, and 1207JA, Policy Issuing Agency Contract between First American and Patriot Title.

[5] See 1183JA, at ¶¶ 1, 8 (authority is limited to solicit applications for title insurance, collect premiums, issue title insurance policies and issue title commitments). See also 1207JA, at ¶¶ 1, 2 (agent may act for First American only for the purposes and in the manner specifically set forth in this contract, and is authorized only to issue in the name of First American "title insurance commitments and policies (including endorsements thereto) [under certain conditions]").

541, 558-559 (WD Mich, 1998); *Sherman v Korff*, 353 Mich 387, 397; 91 NW2d 485 (1958) (fact that one is an agent for one purpose does not make him an agent for all purposes); see also *Nat'l Mortg Warehouse, LLC v Bankers First Mortg Co, Inc*, 190 F. Supp. 2d 774, 780 (D. Md. 2002) (courts have concluded that an issuing agent may, in accordance with an agency contract, wear 'two hats,' one as an agent to issue or sell title insurer's insurance policies, and the other as a settlement agent to conduct closings on his or her own behalf.") (internal citations omitted). Thus, a title agent may properly wear two hats—when issuing title commitments and policies, the Policy Issuing Agent acts as a title agent on behalf of the title insurer (i.e., First American) within the scope of its agency agreement, but when closing real estate transactions, the agent acts as a closing agent on behalf of the lender (i.e., Bank of America).

"Since closing and escrow services fall outside the scope of the agency between agent and insurer, financial institutions often require the insurer to issue a closing protection letter." (Landau & Tsangaris, *The Mortgage Fraud Epidemic*, *supra* p. 36, at 1226JA.) A closing protection letter "is typically issued by a title insurance underwriter to verify the agent's authority to issue the underwriter's policies and to make the financial resources of the national title insurance underwriter available to indemnify lenders and purchasers for the local agent's errors and dishonesty with escrow or closing funds." *New Freedom*, 281 Mich App at 80 (citation omitted). See also *Bergin*, 397 Fed Appx at 126 (1218JA):

> Because there is a difference between closing and issuing a policy, lenders routinely ask for a "closing protection letter" to be issued on behalf of the underwriter. In a closing protection letter, the underwriter agrees to indemnify the lender for any problems that arise from the closing agent's failure to properly apply the funds, as set forth in the closing instructions, and the title insurance commitment. [Citation omitted.]

Thus, while the Policy Issuing Agent may be acting as the lender's agent at closing, and not acting as the agent of the title insurer, a title insurer may have a contractual indemnification

obligation to the lender if there is a closing protection letter and the specific terms of the closing protection letter have been satisfied. This does not, however, transform the closing agent into First American's agent for purposes of closing. The obligation under the CPL is only to indemnify the lender for a specific and limited type of loss, and not to answer for every alleged misdeed of the lender's closing agent.

Closing protection letters ("CPLs") were issued to Bank of America on First American's behalf in connection with the subject loans. (Complaint, ¶ 48, at 041JA.) The CPLs issued in this case have essentially the same operative language. Under the terms of each letter, for any loan closing conducted by a Policy Issuing Agent, First American agreed to reimburse Bank of America for "actual loss" incurred by Bank of America in connection with such closings, but only when such loss "arises out of" one or more of the following:

> 1. Failure of the Issuing Agent to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land . . . , or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings. [See Closing Protection Letters, at 273JA.]

After the closings on the subject loans, Bank of America's borrowers apparently defaulted on their obligations and Bank of America initiated mortgage foreclosure proceedings. (Complaint, ¶ 29, at 041JA.) There is no dispute that Bank of America successfully foreclosed on its mortgage with respect to each of the subject properties, and thereafter acquired marketable title to each of the properties. Nevertheless, Bank of America contends that the loans were fraudulently obtained, and through this litigation, Bank of America sought to recover one

hundred percent of the loan proceeds from various parties to the real estate transactions, as discussed below.

II. Procedural History.

On August 13, 2010, Bank of America sued First American, Westminster, Patriot Title, and certain other defendants involved in the subject real estate transactions. As to First American, Bank of America claimed that First American was liable for all of the alleged losses Bank of America incurred in connection with the loans at issue—allegedly $7 million—pursuant to First American's CPLs. (Complaint, ¶¶ 31, 102-108, at 041JA.) Bank of America also asserted claims of breach of contract and negligent misrepresentation against Westminster.[6]

Following discovery, First American filed a motion for summary disposition,[7] arguing that in accordance with *New Freedom*, 281 Mich App at 63, the narrow language of First American's CPLs did not require indemnification in this case, because: (i) there was no evidence that a Policy Issuing Agent had failed to comply with a closing instruction relating to the status of title to real property or the validity, enforceability and priority of Bank of America's mortgage with respect to the properties at issue; (ii) there was no evidence that a Policy Issuing Agent had committed fraud or dishonesty in the handling of Bank of America's funds or the handling of Bank of America's documents in connection with any of the closings, as required by the CPLs; and (iii) Bank of America received the benefit of its bargain—namely, a valid first lien and an enforceable note from a mortgagor—and, therefore, Bank of America did not suffer an actual loss covered by the limited indemnity of the CPL. Additionally, First American established that the full credit bid rule, as stated in *New Freedom* and other Michigan

[6] The remaining defendants were either dismissed or defaulted. As such, Bank of America's claims against them are not germane here.

[7] Westminster concurred in First American's motion, and also filed its own motion for partial summary disposition.

jurisprudence, limited Bank of America's damages, because Bank of America had made full credit bids with respect to two of the properties. (See First American's Motion for Summary Disposition, 207JA.)

Relying exclusively on Paragraph 2 of the CPLs, Bank of America claimed that it was entitled to partial summary disposition on the Patriot Title closings under MCR 2.116(I)(2), and that genuine issues of material fact precluded summary disposition with respect to the two loans closed by Westminster. Regarding the former, Bank of America argued that inferences that Patriot Title's closing agents were aware of the borrowers' misrepresentations at the time of the closings established liability under Paragraph 2. Regarding the latter, Bank of America asserted that genuine issues of material fact existed regarding whether the Westminster's closing agents fraudulently handled Bank of America's documents and the HUD-1s. Concerning damages, Bank of America argued that the full credit bid rule does not apply to CPLs. (See Bank of America's Response to First American's Motion for Summary Disposition, 343JA.)

First American replied that Paragraph 2 of the CPLs did not provide for indemnification where all payees of Bank of America's loan were disclosed in the HUD-1s, which in any event are not Bank of America's documents as a matter of law, and where Bank of America obtained a valid, first mortgage lien on each of the properties. First American also pointed out that the full credit bid rule is controlling precedent under *New Freedom* and settled law under other Michigan jurisprudence. (See First American's Reply, 663JA.)

Following the ensuing motion hearing, the Circuit Court issued an opinion and order on September 22, 2011 granting both First American and Westminster's motions for summary disposition. (Summary Disposition Opinion and Order, 22JA.) The Circuit Court held that the CPLs did not require indemnification where Bank of America's allegations were unrelated to the

status of title to the property or the priority of Bank of America's liens and where there was no evidence of concealed disbursements, shortages, or unpaid lien holders.

After Bank of America's subsequent motion for reconsideration was denied, Bank of America filed its claim of appeal as of right on December 21, 2011. The Court of Appeals heard oral argument on August 13, 2013 and issued an unpublished, per curiam opinion dated March 27, 2014 with a dissent by Chief Judge Murphy. (See 25JA-40JA.) The Court of Appeals: (a) affirmed the dismissal of Bank of America's claims against Westminster regarding the Enid and Heron Ridge properties, agreeing with the Circuit Court that there were no genuine questions of fact as to whether Westminster engaged in fraud or dishonesty covered by the CPL; (b) reversed the dismissal of Bank of America's claims regarding the Golf Ridge property, holding that there were questions of fact as to whether Patriot Title engaged in fraud or dishonesty covered by the CPL; and (c) affirmed the dismissal of Bank of America's claims regarding the Kirkway property, holding that its claims were barred because it had no recoverable damages under the full credit bid rule.[8] (37JA.)

Bank of America filed a motion for reconsideration of the Court of Appeals' decision on April 17, 2014. (20JA.) On May 22, 2014, the Court of Appeals issued an order denying Bank of America's motion (*Id.*). Bank of America thereafter filed its application for leave to appeal to this Court on July 2, 2014 (*Id.*) First American responded to Bank of America's application (20JA-21JA), and the Bank replied to First American's response. (21JA.) On November 19, 2014, this Court granted Bank of America's application. On January 28, 2015, Bank of America filed its brief on appeal, and First American's time to file its response was extended by motion to March 25, 2015.

[8] The Court of Appeals also held that Bank of America's claims regarding the Enid property were barred by the full credit bid rule. (37JA.)

ARGUMENT

I. The Court of Appeals correctly applied the full credit bid rule to bar Bank of America's indemnity claim regarding alleged losses on the Enid and Golf Ridge properties.

Bank of America's indemnification claims against First American sound wholly in contract. Thus, whether the CPLs provide for indemnity with respect to Bank of America's specific claims is dispositive as to Bank of America's claim against First American. As noted earlier, under the narrow terms of each letter, for any loan closing conducted by First American's Policy Issuing Agents, First American agreed to reimburse Bank of America for "actual loss" incurred by Bank of America in connection with such closings, but only when such loss "arises out of" one or more of the following:

> 1. Failure of the Issuing Agent to comply with your written closing instructions to the extent that they relate to (a) the status of the title to said interest in land or the validity, enforceability and priority of the lien of said mortgage on said interest in land . . . , or (b) the obtaining of any other document, specifically required by you, but not to the extent that said instructions require a determination of the validity, enforceability or effectiveness of such other document, or (c) the collection and payment of funds due you, or
>
> 2. Fraud or dishonesty of the Issuing Agent handling your funds or documents in connection with such closings.

(CPLs, 273JA.) This language makes crystal clear that the indemnification provided under the CPLs is limited in scope. It is *only* the occurrence of an event specifically enumerated in Paragraphs 1 or 2 that gives rise to First American's contractual liability for an "actual loss" incurred by Bank of America.

Here, the Court of Appeals correctly determined that Bank of America could not establish an "actual loss" with respect to the Enid and Kirkway properties based upon the application of the full credit bid rule. When a lender like Bank of America bids at a foreclosure sale, it is not required to pay cash for the property, but rather it is permitted to make a credit bid, because any

cash tendered by the lender would be returned to it. *New Freedom*, 281 Mich App at 68; *Griffin v Union Guardian Trust Co*, 261 Mich 67, 69; 245 NW 572 (1933). When a lender makes a full credit bid—i.e., the amount of the unpaid principal and interest, plus costs—the mortgage debt is satisfied, the mortgage is extinguished and the lender receives title to the property. *Id.*

Bank of America does not (and cannot) dispute that it made full credit bids with respect to the Kirkway and Enid properties. (Bank of America's Interrogatory Answers, at 0196JA.) Indeed, at the time of its foreclosure, Bank of America bid and successfully acquired these two properties for more than it was owed on them, and it bid and successfully acquired the other two properties for nearly what it was owed on them:

Property	**Amount owed**	**Sheriff's Deed**
13232 Enid	$3,944,267.09	$3,969,161.55
1550 Kirkway	$1,562,755.05	$1,575,206.02
1890 Heron Ridge	$2,868,979.52	$2,650,000.00
1766 Golf Ridge	$1,534,834.01	$1,200,000.00

(See 0196JA, 0198JA, 0201JA, 0226JA and 0228JA.) The sheriff's deeds acknowledge that Bank of America's bids were made at sheriff's sales which were "open and fair . . . and [made] in good faith[.]" (0198JA, 0201JA, 0226JA and 0228JA.)

Bank of America contends that, notwithstanding its full credit bids on the Enid and Kirkway properties, the Court of Appeals should have disregarded well-established Michigan law and allowed Bank of America to sidestep the full credit bid rule so it could pursue damage claims against First American with respect to these two properties. The Court of Appeals appropriately declined Bank of America's invitation to ignore the controlling law, and respectfully, so should this Court.

A. The Court's application of the full credit bid rule to Bank of America's claims against First American is entirely consistent with Michigan case law and is a correct rule of law.

The Court of Appeals' application of the full credit bid rule in this case was proper and wholly consistent with not only *New Freedom*, which it followed, but also other Michigan jurisprudence. The full credit bid rule prohibits a lender like Bank of America from recovering on claims of fraud, misrepresentation and breach of contract against a title insurer, where the lender makes a full credit bid to acquire property through foreclosure and subsequently claims the secured property was worth less than the amount of its bid. *New Freedom*, 281 Mich App at 68-74. *See also, C & D Capital, LLC v Colonial Title Co*, 2013 WL 2278127 at *5, *10 (Mich App, May 23, 2013) (affirming dismissal of claims against title insurers, holding that "the full credit bid rule extends to negligence and fraud or misrepresentation claims against a non-borrower third party.").[9]

The policy and rationale for the full credit bid rule was succinctly stated by this Court nearly four decades ago: "To allow the mortgagee, after effectively cutting off or discouraging lower bidders, to take the property—and then establish that it was worth less than the bid—encourages fraud, creates uncertainty as to the mortgagor's rights, and most unfairly deprives the sale of whatever leaven comes from other bidders." *Smith v General Mortgage Corp*, 402 Mich 125, 129 (1978); 261 NW2d 710 (1978).

Contrary to Bank of America's rhetoric in its Brief on Appeal, there is nothing remarkable about the Court of Appeals' determination in *New Freedom, C & D Capital* or in this

[9] As Bank of America notes in its Brief on Appeal (at 3, n 6), two other appeals are pending in the Court of Appeals relating to the full credit bid rule. *Bank of America, NA v Fidelity National Title Ins Co* (Docket No. 316538) and *Bank of America, NA v Fidelity National Title Ins Co* (Docket No. 311798). In each case, the circuit court granted summary disposition to Fidelity National Title Insurance Company, holding that Bank of America could not recover under a CPL because it had made full credit bids on three of the four properties at issue.

case that a lender like Bank of America is prohibited from having it both ways after a foreclosure. Nor has the Court of Appeals "judicially legislated a new rule," as suggested in the Bank's Brief on Appeal (at 46); instead, the Court of Appeals merely applied the long-established rule according to its plain meaning: a lender cannot foreclose on its security interest (and obtain title to property) claiming that the value of the property is higher for foreclosure purposes, but then later seek damages claiming that the value of the property is somehow less than what was bid at foreclosure for purposes of that later lawsuit.[10]

A lender is appropriately held to the value of its bid, and where its bid is equal to the amount it is owed, there is no deficiency and the lender has suffered no damage. *E.g.*, *Bank of Three Oaks v Lakefront Props*, 178 Mich App 551, 562; 444 NW2d 217 (1989) ("with the bank's bid at the foreclosure sale of the entire amount of the indebtedness, no deficiency existed and the absence of a deficiency removed any potential claim of the bank under the guarantee"). In *Pulleyblank v Cape*, 179 Mich App 690, 694-95; 446 NW2d 345 (1989), the Court of Appeals explained:

> [A]s a purchaser under the foreclosure sale, a mortgagee stands in the same position as any other purchaser. *Hogsett v Ellis*, 17 Mich 351, 363 (1868). If a third party had bid and purchased this property for $251,792, regardless of its appraised value, that is the amount Pulleyblank would have received and credited on the debt. Certainly Pulleyblank could not argue in that situation that, since the property was worth only $103,000, the Capes could only receive credit for $103,000 on a debt and Pulleyblank should be able to pocket the windfall from the sale. Likewise, Pulleyblank, as the purchaser, "paid" $251,792 for the property, even though no actual cash exchanged hands. Therefore, Pulleyblank,

[10] Even without the full credit bid rule, well-settled estoppel principles would prohibit a lender from claiming in subsequent proceedings that the value of the property it acquired through foreclosure is less than what the lender bid to acquire the property. E.g., *Paschke v Retool Industries*, 445 Mich 502, 509; 519 NW2d 441 (1994) (under the doctrine of judicial estoppel, "'a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.") (citations omitted).

> as mortgagee, "received" $251,792 for the Howell property, and this purchase price must be applied to the debt. . . .
>
> It would defy logic to allow Pulleyblank to bid an inflated price on a piece of property to ensure that they would not be overbid and to defeat the equity of redemption and to then claim that the "true value" was less than half of the value of the bid.

Yet this is precisely what Bank of America tried to do here. Bank of America successfully acquired fee simple title to the Kirkway and Enid properties by bidding the full amount of its borrowers' debt, thereby extinguishing the debt and the mortgage. Bank of America cannot now claim that the value of the properties *to Bank of America* is somehow less than what it "paid" as purchaser, and "received" as mortgagee, as a consequence of the foreclosure proceedings. *Pulleyblank*, 179 Mich App at 695. As a matter of well-settled law, Bank of America "received" the full amount of its borrower's debt when it made full credit bids to acquire the Enid and Kirkway properties. Accordingly, the Court of Appeals correctly determined that Bank of America had no damages—which are "an essential element" of its breach of contract claim—and, therefore Bank of America has no viable claim under the CPLs.

B. Bank of America grossly exaggerates the purported consequences of the full credit bid rule's application in this case and in future cases.

Bank of America's Brief on Appeal is peppered with predictions of dire consequences if the full credit bid rule continues to apply to prohibit a lender from pursuing claims for alleged damages against third parties. Bank of America's predictions are exaggerated, if not entirely misplaced.

For instance, Bank of America suggests that lenders will now be required to pursue deficiency judgments against "beleaguered" or "unsophisticated" borrowers as a condition precedent to seeking recovery from third parties. (Brief on Appeal at 46.) In fact, it is often the borrowers who are the "fraudsters" and benefit from a full credit bid, if one is made. (See

Exhibit 4 to this brief, Landau & Tsangaris, *The Mortgage Fraud Epidemic*, *supra* p. 33, at 1226JA, observing that "[i]n some circumstances, the borrower is fully aware of the scam and agrees to execute the loan application and closing documents in exchange for a portion of the loan proceeds.").[11] Moreover, making a less than full credit bid does not obligate a lender to pursue the borrower for a deficiency—the lender has discretion as to whether (or not) it will seek a deficiency judgment against its borrower. If the lender makes a less than full credit bid and thereafter determines that its borrower is innocent or "beleaguered," the lender presumably would choose not to pursue a deficiency judgment.

Similarly, Bank of America theorizes that unless the full credit bid rule is altered by this Court, lenders will be forced to avoid full credit bids in case they later discover they were victims of mortgage fraud. (Brief on Appeal at 46.) This is not true. Lenders are not obligated to immediately foreclose. As Bank of America notes in its Brief on Appeal (at 30, n 69), the statute of limitations for actions based on covenants in real estate mortgages is ten years. Lenders have ample time to do what they should already be doing; namely, diligently investigate their defaulted loans (as well as the integrity of their borrowers and the value of their security) to accurately assess the situation before they foreclose and before they determine the amount of their bid.

Bank of America also posits that application of the full credit bid rule here creates an injustice to lenders. As noted earlier, however, there is no injustice when a lender is held to the bid it chooses to make to acquire foreclosed property. In fact, it would be unjust for a lender to

[11] Indeed, "stated income loans" like those at issue in this case are often referred to as "liars' loans," because they allow "borrowers or their mortgage brokers or loan officers to overstate income and/or assets in order to qualify the borrower for a larger mortgage." (See Investopedia, http://www.investopedia.com/terms/l/liar_loan.asp.)

voluntarily bid the full loan amount to acquire foreclosed property, and after successfully obtaining title to the property, thereafter assert that the property was worth less than its bid so it can pursue claims against others. This is especially true given that when a lender makes a full credit bid and the borrower's debt is satisfied, the lender is also impairing First American's subrogation rights under the CPLs. (See CPLs at 1, Section B, at 0273JA: "When the Company shall have reimbursed you pursuant to this letter, it shall be subrogated to all rights and remedies which you have had against any person or property had you not been so reimbursed.").

Subrogated title insurers cannot seek reimbursement from borrowers—who, as Bank of America's counsel observed, are often involved in the mortgage fraud scheme—because the lender's decision to make a full credit bid, and the resulting satisfaction of the borrower's debt, eliminates that right of recovery for the title insurers. (See Landau & Tsangaris, *The Mortgage Fraud Epidemic*, p. 33, at 1226JA.)[12]

In short, the Court of Appeals' analysis and application of the long-standing full credit bid rule regarding Bank of America's alleged damages in this case is wholly consistent with settled Michigan law. Moreover, the Court of Appeals' decisions in this case and in *New Freedom* in no way create the dire circumstances prophesied by Bank of America.

[12] Indeed, as a consequence of Bank of America's full credit bids concerning the Enid and Kirkway properties, and its impairment of First American's subrogation rights under the CPL, First American is excused from performing under the CPLs and the dismissal of Bank of America's claims against First American was entirely appropriate for this additional reason. (See CPLs at 1, Section B, at 0223JA: "Liability of the Company for such reimbursement shall be reduced to the extent that you have knowingly and voluntarily impaired the value of such right of subrogation.").

CONCLUSION

For all of these reasons, First American respectfully requests that this Court affirm the Court of Appeals' March 27, 2014 opinion per curiam in its entirety.

BROOKS WILKINS SHARKEY & TURCO, PLLC

By: /s/ Steven M. Ribiat
Steven M. Ribiat (P45161)
401 S. Old Woodward, Suite 400
Birmingham, MI 48009
(248) 971-1800
Attorneys for First American Title Insurance

Dated: March 25, 2015